ARGUMENTS

BEFORE THE

COMMITTEE ON PATENTS

OF THE

HOUSE OF REPRESENTATIVES

ON

H. R. 13570,

AUTHORIZING THE REGISTRATION OF THE NAMES OF HORTICULTURAL PRODUCTS AND TO PROTECT THE SAME.

MARCH 28, 1906.

COMMITTEE ON PATENTS, HOUSE OF REPRESENTATIVES,

FIFTY-NINTH CONGRESS.

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ARGUMENT ON H. R. 13570, AUTHORIZING THE REGISTRATION OF THE NAMES OF HORTICULTURAL PRODUCTS AND TO PROTECT THE SAME.

COMMITTEE ON PATENTS,
HOUSE OF REPRESENTATIVES,
Washington, D. C., Wednesday, March 28, 1905.

The committee met this day at 10.30 o'clock a. m., Hon. Frank D. Currier in the chair.

Present: Messrs. Currier (chairman), Dresser, Hinshaw, Bonynge, Chaney, McGavin, and Gill.

The CHAIRMAN. Gentlemen, we will now take up the bill known as the horticultural bill, No. 13570. We are ready to hear you now, Mr. Kirk.

STATEMENT OF MR. HYLAND C. KIRK.

Mr. KIRK. At the suggestion of the chairman of the committee we have made an amendment, or rather, arranged the bill as an amendment to the laws of the United States relating to the registration of trade-marks, as it would be better in that form, doubtless, if it were adopted. It may be well to read the bill. There is a clause, perhaps, or more, that have been slightly changed to meet the necessities of the case. [Reading:]

A BILL To amend the laws of the United States relating to the registration of trade-marks.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the act entitled "An act to authorize the registration of trade-marks used in commerce with foreign nations or among the several States or with Indian tribes, and to protect the same," approved February twentieth, nineteen hundred and five, be, and the same is hereby, amended by inserting after section twenty-eight thereof three sections, to be known as section 28a, section 28b, and section 28c, as follows:

SEC. 28a. That any person who has discovered, originated, or introduced any new variety of plant, bush, shrub, tree, or vine, and gives and applies thereto a name, may obtain registration for such name by complying with the following requirements: First, by filing in the Patent Office an application therefor in writing, addressed to the Commissioner of Patents, signed by the applicant, specifying his name, domicile, location, and citizenship, the species or variety of horticultural product to which such name is applied, and the name or names of the parent stock from which such variety is derived. Second, by paying into the Treasury of the United States the sum of ten dollars and otherwise complying with the provisions of this act and such rules and regulations as may be prescribed by the Commissioner of Patents: *Provided*, That no name for which

application for registration under the provisions of this section may be made shall be refused registration unless such name is:

1. Identical with a known unregistered name for the same species or variety of product belonging to a person other than the applicant;

2. Identical with a previously registered name for the same species or variety of product; or

3. Has been dedicated to the public by the discoverer or originator of such variety.

Mr. BONYNGE. Before you read section 28b I want to ask you is it your understanding of that section that any person who has discovered or originated such a variety of plant as is described in the section of the bill would be entitled to a trade-mark for the plant, whether or not it is used in interstate commerce?

Mr. KIRK. Whether it is sold or not.

The CHAIRMAN. Whether or not it is used in interstate commerce is the question.

Mr. KIRK. That is under the law. Do you mean whether it would be entitled?

The CHAIRMAN. Whether it is actually used in interstate commerce. That is the question.

Mr. BONYNGE. Do you mean to say if a man ever originated a new plant and had not used it in interstate commerce at all that under your bill you intend he should have a trade-mark on it?

Mr. KIRK. No; that is not the purpose of it.

Mr. BONYNGE. Would he not under the language of your section?

Mr. KIRK. The idea is not to prevent the sale and dissemination, but to protect——

Mr. BONYNGE. That is not the question. If we have any constitutional power at all to legislate upon the question presented by your bill, it must be because the article is the subject of interstate commerce, and it must have been used in interstate commerce before we would get any power to legislate upon the question. Under the language you have prepared anybody who has discovered or developed such a plant as described in the section, whether it is used in interstate commerce or not, would still be entitled to register a trade-mark upon that particular plant.

Mr. KIRK. This contemplates, of course, the sale and dissemination of the article.

Mr. BONYNGE. It would have to be disseminated before we would have any authority.

Mr. HINSHAW. The general act only pertains to things which have been used in interstate commerce.

Mr. KIRK. It would hardly be necessary to make an argument upon that point.

The CHAIRMAN. We can not protect the rights of anybody when he confines his business to a single State. We have no constitutional power whatever to legislate upon it.

Mr. KIRK. I did not catch the point. There is hardly a product that has been originated by any propagator that would not properly come within interstate law. For instance, take the Crawford peach; take the Bartlett pear, or any of those old products. Of course they have gone all over the country. The same thing is true of many new products, and they are in process of being disseminated throughout the whole country, and would naturally and inevitably come under the interstate-commerce law.

The CHAIRMAN. I think the understanding of the committee is that it will be necessary, before you can get a Federal trade-mark, to show that you are actually using that mark on goods within the scope of interstate commerce. You can not anticipate that use.

Mr. KIRK. That is not the idea at all. There is no desire to anticipate, except to have a law by which the person who is using it may obtain his rights.

Mr. BONYNGE. The language of your bill provides that any person who has discovered or introduced a new variety of plant shall be given the right to register a trade-mark.

Mr. HINSHAW. That could be amended by adding the words "and used in interstate commerce."

Mr. BONYNGE. Can he do it now under the present trade-mark law?

The CHAIRMAN. No. In the first place this opens the door wide to register anything with a trade-mark.

Mr. BONYNGE. Yes; regardless of the description.

Mr. KIRK. That involves the main part of this argument, and if you will allow me to go through with it I will be glad to answer any questions.

The CHAIRMAN. Certainly; proceed in your own way.

Mr. KIRK (reading):

SEC. 28b. That every certificate of registration issued on an application for the registration of the name of a horticultural product shall contain a grant to the registrant, the legal representatives or assigns of such registrant, for the term of twenty years of the exclusive right to propagate for sale and vend such variety of horticultural product under the name so registered throughout the United States and Territories thereof: *Provided*, That the flowers, fruits, or food products produced from such registered variety may be sold by any person whatsoever for any purpose other than that of propagation.

The CHAIRMAN. You do not confine that to interstate commerce. That proposition is as clearly unconstitutional as anything can be.

Mr. KIRK. Interstate commerce contemplates the entire United States.

The CHAIRMAN. You contemplate commerce within the States as well as between the States?

Mr. KIRK. As I understand the law, interstate commerce does not prevent people from selling in individual States.

Mr. BONYNGE. No; but when you do sell within an individual State it is a matter for the regulation of the State and not of the Federal Government.

Mr. KIRK. If it is confined to that State, yes; but the interstate-commerce provision does not say anything about the sales within the State, if it is sold between the States.

Mr. BONYNGE. The only portion we can legislate upon is that which is interstate in its character. Your bill attempts to regulate that which is confined within the limits of the State as well as interstate commerce.

The CHAIRMAN. You can not combine the two. The Supreme Court has expressly declared it is unconstitutional.

Mr. BONYNGE. You include business within the limits of the State, and that is the objection. The Supreme Court has decided that when you do that you render the whole bill unconstitutional.

Mr. KIRK. Do you mean to tell me that when the patent law was constructed Congress had no jurisdiction?

The CHAIRMAN. That is under another clause of the Constitution altogether.

Mr. BONYNGE. That has nothing to do with this. If we have any power over trade-marks at all, it is under the clause of the Constitution which gives to Congress the power to regulate interstate commerce.

Mr. HINSHAW. If you had a horticultural article which was the subject of interstate commerce, and you had a registration, and it had been used, it would protect that article probably within the State——

The CHAIRMAN. On its journey between the States, and as long as it remained in the original package or in the hands of the original purchaser.

Mr. BONYNGE. That is all.

The CHAIRMAN. That is all. The minute the package is broken, or the minute it is once sold, the Federal Government loses all control.

Mr. HINSHAW. This bill could be amended to cover that.

Mr. KIRK. There is no reason why it could not be restricted in that section—

Provided, That the flowers, fruits, or food products can be sold for any purpose other than that of propagation.

This bill does not attempt to put any monopoly upon the sale of food products, nor the seeds, plants, cuttings, and so forth, designed for propagation. [Reads:]

SEC. 28c. That all names of horticultural products presented for registration shall be subject to publication, opposition, appeal, and interference proceedings under the same terms and conditions as is now provided for trade-mark applications; and that the remedies and penalties provided for the infringement of trade-marks shall be applicable to horticultural names registered under the provisions of this act.

The CHAIRMAN. The matter you have read you can file with the stenographer.

Mr. KIRK. I will.

It is true that neither patent nor copyright laws nor trade-mark laws as they now exist are exactly fitted to protect propagators of new varieties. The words in the patent laws "to manufacture and use" would not, of course, apply to the development of plants. Books become parts of libraries, while plants become parts of estates. There is no bearing of the law upon the other situation.

The design of this bill is in its broad aspects first to protect the people of the United States and encourage them in the propagation of new varieties, and developing the best, to secure the very best varieties to the different regions. The State of Minnesota has recently offered a thousand dollars for the best apple adapted to that climate.

Second, the design is to protect originators and to propagators in their right to grow, or to name, to disseminate and sell their products. Now, it is unfortunately true that in the past those people who have devoted their lives, or much of their lives, to the work of propagating have received very little reward, if any. I have made a pencil list here of some of the names. Among them is the Rev. J. R. Reasoner, who originated the Senator Dunlap strawberry. It is one of the best selling and commercial plants of the kind, and yet he received little or nothing for it. Ephraim Bull, who propagated the Concord grape, died in poverty. Judge Miller, of Bluffton, Mo., who spent his life in this work, was always poor. F. W. London, of Janesville,

Wis., had the same experience, and died poor. Amos Miller, of Columbus, Ohio, was many years engaged in this work——

Mr. BONYNGE. I do not like to interrupt you, but the main purpose of this bill, after all, as I suppose you are now arguing, is to give a monopoly for twenty years to the man who originates the plant, or shrub, or tree, or vine, or whatever it may be, is it not?

Mr. KIRK. It is to give them some chance to receive something for their labor.

The CHAIRMAN. It does give them the monopoly to produce and sell under a name which they give to the plants.

Mr. BONYNGE. Not only under the name, but a monopoly to sell that particular variety under any name, no matter what name.

Mr. KIRK. No; I beg pardon. Only under the name registered.

Mr. HINSHAW. That refers to any change from the existing plant in a small degree, or change in the flower, or size of fruit, or taste, or something of that kind?

Mr. KIRK. Yes.

Mr. BONYNGE. Where will we get the power to do that? We can prevent anybody else from using that name, but——

The CHAIRMAN. We have not the constitutional power to pass a bill as broad as this.

Mr. KIRK. You will, at least, gentlemen, see the justice of what I have to say, and if this measure does not give the requisite relief, perhaps a modification of the bill would do so. There is no question but that this class of investigators ought to be rewarded. Luther Burbank, who has recently come into prominence as being very successful in this line, was poverty stricken for years, and until the Carnegie Institute came to his relief he was in almost abject poverty. The general principle of protection was just the same, I take it.

Mr. HINSHAW. I do not suppose anybody would dispute that proposition, that these people ought in some way to be rewarded for their long efforts in bringing about new varieties and better products. The only question is how we can reach it?

Mr. BONYNGE. We are acting under the Constitution. We have only such power as the Constitution gives to us; and, as I view it, this is an attempt to include something under or extend the patent laws, as well as the trade-mark laws in some of its features.

Mr. HINSHAW. It seems to be more under the patent law than under the trade-mark law.

Mr. KIRK. If you find this can not be accomplished in this way, it might lead to its accomplishment in another way.

There is a third class—that is, the purchasers, that need to be protected as well as the propagators, and we think that this law has that idea. In this bill as presented there is that idea of protecting the purchaser and preventing unreasonable rates to some extent; and the purchaser also should be protected in receiving genuine specimens. This matter has received attention from horticultural and other societies for many years.

Here is a letter which was written in 1899, and I will just read a paragraph from it. It is from a very prominent nursery firm in western New York, Jackson & Perkins Company, Newark, Wayne County, N. Y. One paragraph reads this way:

We take this opportunity of inquiring whether you are possessed of any special information upon the subject of trade-marks in connection with the

names of new varities of fruits or plants of any kind. It has been a very important question with us and with many other nurserymen as well to know how to protect one's self in the introduction of a new variety of fruit. Many new introductions in the line of fruit and flowering plants are extremely valuable, and are the result of years of the most careful work. It would seem to us that the originator of such a variety is as much entitled to protection as the patentee of some new valuable invention, but so far as we know there is no such protection procurable under the present laws. If you are fully informed upon this subject we should esteem it a very great favor if you would kindly tell us what you know about the matter, as it is possible we might require your services upon some occasion in the near future.

Mr. BONYNGE. My present view is, if you can get any protection at all, it will be by an amendment of the patent law rather than amendment of the trade-mark law.

Mr. GILL. Would plant breeding be in the line of animal breeding?

Mr. KIRK. All life has similarity. There is no question about that.

Mr. GILL. You can not grant a patent right to a fellow who starts a string of trotting horses or running horses?

Mr. KIRK. That is not the same as in this bill.

Mr. MCGAVIN. It is the same principle, pretty much.

Mr. KIRK. The man who secures a superior breed of trotting horses gets a superior prize.

The CHAIRMAN. The fellow who originated the Tom Lawson pink certainly got a good price for it.

Mr. KIRK. They get quicker results than in the case of plants?

In the proceedings of the Horticultural Society for 1901 this matter was discussed, and Jacob Moore, of Attica, N. Y., now of Canandaigua, N. Y., read a paper on "Plant Patents," in which he advocated the establishment of a new bureau or division under the Patent Office, which should be occupied with the registration of patents on plants. I have read that over with great care. I also have a letter from Mr. Moore, but the project seems to be too cumbersome for adoption at present. It involves a number of new officers and experts having special qualifications, and I think it would hardly be favored by this committee or by Congress. But the trade-mark plan I have looked into very carefully, and it seems to me feasible, even if this bill does not meet your requirements and suggestions.

Mr. BONYNGE. From your reading of the bill I am convinced that it is wholly unconstitutional.

Mr. KIRK. That you will have to consider. It has been urged in a Supreme Court case—one objection has been urged—that "the protection of a trade-mark can not be obtained for an organic article which, by the law of its nature, is reproductive." [Laughter.]

But let us look at that for a moment. The answer is that such protection should obtain if it is a matter of justice, and every inventor uses natural materials in his work and works under natural law, precisely the same as the propagator in that respect.

Mr. BONYNGE. In other words, you do not think the court decided it right?

Mr. KIRK. This was not a decision, but a reference in a decision.

Mr. BONYNGE. You are reading from the decision now?

Mr. KIRK. I am reading from a part of a brief filed in the case.

The CHAIRMAN. Not from the decision?

Mr. KIRK. No. It has been urged that "no one can obtain protection for the exclusive use of a trade-mark or trade name which would practically give him a monopoly in the sale of goods other than those

produced or made by himself." That is in the decision. This is conceded and is taken into account in the bill as presented. It is the work of the propagator himself that we are anxious to protect—the work of those men who may spend their lifetimes in originating new varieties. That is the purpose of this bill.

Mr. McGavin. The only protection he would have would be that a man could use some strawberry under another name, for example.

Mr. Bonynge. Let a man register a trade-mark for this particular kind of match, for instance. [Indicating.] Anybody else can make a similar match, but no one would have to take the name of the "Blue Ribbon Parlor Match." He could make the match and call it something else.

The Chairman. Yes; that is one of the distinctions between patents and trade-marks.

Mr. Hinshaw. The match might be patented.

The Chairman. And nobody else can sell or make the same match.

Mr. Bonynge. When it has a trade-mark nobody can use the same trade-mark.

Mr. Kirk. I should have to admit that there is a distinction between a trade-mark and a patent.

Mr. Bonynge. You are trying to combine the patent features by giving the exclusive right.

The Chairman. It is impossible to combine the two, because the authority that Congress has is derived from different clauses in the Constitution.

Mr. Bonynge. Absolutely.

Mr. Kirk. I suppose they all spring from the same principle of justice, and the question whether a man should be protected or not is the first.

Mr. Bonynge. No; the first question is whether Congress has the power to act.

The Chairman. That is the first question, whether the Constitution gives us the power.

Mr. Kirk. The reason for Congress is to protect the rights of citizens.

Mr. Bonynge. No; the reason for the existence of Congress is to carry out the Constitution of the United States.

Mr. Chaney. The Constitution limits us.

Mr. McGavin. There must be fixed rules for your own protection.

Mr. Kirk. I want to urge upon the committee the urgent need for this law, and if this bill as presented is not exactly the thing, it may be modified.

Mr. Hinshaw. Has this bill had the consideration of eminent trade-mark attorneys? Have they given it careful review?

Mr. Kirk. It has been considered by several. Some have not approved of it, and others thought it might be operative.

Now, I presented here some weeks ago a letter received from Colonel Brackett. I have here the original letter, which I will read [reading]:

Washington, D. C., *March 3, 1906.*

Prof. H. C. Kirk,
No. 242 North Capitol street, City.

Dear Professor Kirk: Referring to the bill H. R. 13570, a bill authorizing the registration of the names of horticultural products and to protect the same,

a copy of which you left with me, allow me to say in advance that you have my hearty indorsement and support of any measure that has for its object the protection of property rights of persons who have by their skill and persistent effort originated any new and valuable species or variety of fruit or plant, and if you are successful in having a law enacted that shall accomplish in every respect the object aimed at in the above bill you will have conferred a great good upon a class of workers who are worthy and entitled to the benefits derived from such a law by protecting their rights to such property.

In regard to the bill I would suggest that line 2, page 2, be changed so as to read, "the same species or variety of product:" and that line 4 be changed to read the same as line 2; and inasmuch as the courts have decided that geographical and surnames can not be used as trade-marks, I would suggest that the bill be so framed as to comply with said ruling. There may be other points that you may find necessary to make the bill effective.

Hoping you will succeed in your efforts along this line, I beg to remain,

Sincerely, yours,

G. B. BRACKETT, *Pomologist.*

He makes some slight changes, but otherwise not important.

Here are some letters also from propagators. I would like to read to you one from Mr. Crawford, of that famous family which propagated the Crawford peach.

The CHAIRMAN. Will you leave those with the stenographer?

Mr. KIRK. Yes. He says [reading]:

CUYAHOGA FALLS, OHIO, *March 19, 1906.*

Mr. F. T. F. JOHNSON, *Washington, D. C.*

DEAR SIR: Replying to your favor of March 16, I am very much interested in the bill introduced by Mr. Allen, of Maine. It will be an act of simple justice to originators and a great protection to horticulturists who are progressive and want to test new and improved varieties. As it is now an originator may work ten or twenty years to produce a variety worth naming and introducing. If he attempts to introduce it himself he will hardly get enough out of it the first year—the only year he controls it—to pay the printer. The second year he is undersold by competitors, many of whom never saw the real thing.

Nurserymen commonly pay but a trifle for a new fruit because they can have control of it so short a time. If the owner of a new variety could have control of it for a term of years people could buy plants of him with the assurance of getting stock true to name. As it is now much spurious stock is sold by dishonest men who want to reap the benefit of another's industry. If an originator could have some protection he would be encouraged to have his products thoroughly tested at the experiment stations before putting them on the market.

The Senator Dunlap strawberry was originated by J. R. Reasoner, an old preacher. When it was introduced he received but a little for it, and yet it is the greatest money-maker in the country at this time. Ephraim Bull, who gave us the Concord grape, died in poverty. It is well known that originators are apt to go unrewarded. This has discouraged many from engaging in the work. What patents have done for manufacturing this bill will do for horticulture. I sincerely hope it will pass.

Yours, sincerely, M. CRAWFORD.

Here is a letter from Mr. W. J. Graves, fruit grower and originator of the Graves peach [reading]:

PERRY, LAKE COUNTY, OHIO, *March 1, 1906.*

F. T. F. JOHNSON, *Washington, D. C.*

DEAR SIR: Yours of the 26th at hand and contents noted. Can say that we can heartily indorse the bill inclosed. Think the originator or introducer of new varieties of fruits should be protected. Have noticed in the horticultural papers that few new varieties are being introduced. We think the reason is that the introducer has no protection. Just as he gets a good thing on the market the nurseryman takes it up and away goes all his profit. We know this from experience.

Yours, very truly, W. J. GRAVES.

Here is one from John F. Sneed, proprietor and propagator of general nursery stock at Tyler, Tex., in regard to the registration of horticultural products and the protection of the same [reading]:

TYLER, TEX., *March 9, 1906.*

F. T. F. JOHNSON, *Washington, D. C.*

DEAR SIR: I have read Mr. Allen's (of Maine) bill, introduced in Fifty-ninth Congress, first session, in regard to the registration of horticultural products and the protection of same, all of which I heartily indorse. I trust you will render any assistance possible in having the bill pass, as it will enable the originators or introducers of new fruits to get the benefit of their labors in originating, advertising, and disseminating same; otherwise there will be very little encouragement for an attempt to create new varieties and introduce same.

Very respectfully,

JNO. F. SNEED.

I have a similar letter from Sherman, Tex., from the Crawford Nursery and Orchard Company [reading]:

SHERMAN, TEX., *March 3, 1906.*

F. T. F. JOHNSON, *Washington, D. C.*

DEAR SIR: We have your communication of the 26th, together with a proposed law. We are writing our Congressman, Mr. Randell, on the subject, and appreciate your interest in the matter, and hope that this law will be beneficial to the introducers of new fruit.

With kindest regards, we beg to remain,

Yours, very truly,

COMMERCIAL NURSERY AND ORCHARD COMPANY.
JNO. S. KERR.

NEWARK, N. Y., *March 17, 1906.*

In reply to yours of the 15th.

Mr. F. T. F. JOHNSON, *Washington, D. C.*

DEAR SIR: Yes, we are very much interested in the bill recently introduced in Congress for the protection of people introducing new varieties of plants. We had forgotten ever having written you upon the subject, but it is one in which we are permanently interested, and it would appear to us that the bill, of which you inclose a copy, is one which covers the necessities of the case very satisfactorily. If there is anything that can be done by nurserymen to assist its passage we should be glad to cooperate in doing so.

Yours, truly,

JACKSON PERKINS CO.

ROCHESTER, N. Y., *March 21, 1906.*

Mr. F. T. F. JOHNSON, *Washington D. C.*

DEAR SIR: Yours inclosing copy of a bill (H. R. 13570) authorizing the registration of the names of horticultural products, and to protect the same, to hand, for which please accept our best thanks.

We are glad to note the introduction of this bill, as we think much good will come of it to the raisers and introducers of new varieties.

We think, however, it should include a penalty clause reimbursing the registrant for all moneys received from unauthorized sales where plants have been surreptitiously grown and sold by unscrupulous parties for the sake of gain.

Please to keep us advised of the progress of this bill so we may write our Representatives in Congress urging the passage of it, and you will much oblige,

Yours, truly,

JOHN CHARLTON & SONS.

McKINNEY, TEX., *February 15, 1906.*

Mr. F. T. F. JOHNSON, *Washington, D. C.*

DEAR SIR: A copy of H. R. bill 13570 has been examined and heartily approved.

The passage of this bill will be very encouraging to those who are spending their lives in the work of improving horticultural products. It will encourage a large number of intelligent experts who are ready to enter this most important field of discovery. They only need protection such as this bill will give.

Such a bill can only do good—no possible harm can arise from it.

Hoping you will succeed in this laudable work,

I am, most respectfully, E. W. KIRKPATRICK.

SANTA ROSA, CAL., *March 21, 1906.*

F. T. F. JOHNSON, Esq., *Washington, D. C.*

DEAR SIR: The bill introduced by Mr. Allen, of Maine, authorizing the registration of the names of horticultural products and to protect the same I think is of the utmost importance.

I can not see where any of its provisions can in any way injure any person, and if protection is available for mechanical and chemical inventions, why in the name of common sense should not new combinations and inventions and discoveries in plant life be also protected?

I am most heartily in accord with this bill, and see no reason why in its present form it should not be of as much of an advantage as is a copyright or patent on any other product of man's care, labor, and skill.

Sincerely, yours, LUTHER BURBANK.

Mr. BONYNGE. I think the question to be regarded here is the constitutional question first.

The CHAIRMAN. As the bill is drawn, I think the members of the committee very clearly feel that it is unconstitutional. We would be glad to hear any gentleman in that connection. I doubt if the committee cares to hear any more as to the justice of the proposition.

Mr. BONYNGE. I think it is a question of our power—the constitutional question.

Mr. HINSHAW. I suggest that the gentleman be allowed to look it up further and report to us.

The CHAIRMAN. Is there any other gentleman who desires to be heard on the bill?

STATEMENT OF MR. F. T. F. JOHNSON.

The CHAIRMAN. For whom do you appear, Mr. Johnson?

Mr. JOHNSON. I appear for a number of nurserymen and also for a number of propagators.

Mr. HINSHAW. Are you a lawyer?

Mr. JOHNSON. Yes.

Mr. HINSHAW. Do you live here in the city?

Mr. JOHNSON. Yes; I have an office in Washington.

The CHAIRMAN. Is there any objection to giving the names of the nurserymen whom you represent? Of course you need not, if you object to doing so.

Mr. JOHNSON. I can do that very readily. I would say that I represent a very large number of these gentlemen. Among the most prominent of them are the White Nurseries, of Massachusetts; Charlton & Son and Jackson and Perkins Company, of New York State; the Graves Nurseries and Crawford Nurseries, of Ohio; the Stark Nursery, of Missouri; the Burbank Experimental Farm, of Cali-

fornia; the Bochman Nurseries, of Arkansas; the Sneeds Nurseries, the Texas Nursery Company, Woods' Nurseries, and Fowler's Nurseries, of Texas; and among originators are N. B. White, Matthew Crawford, E. W. Kirkpatrick, W. J. Graves, C. W. Wood, John S. Kerr, Joseph Bachman, C. H. Perkins, M. E. Fowler, Jacob Moore, Luther Burbank, and a number of others.

The CHAIRMAN. Now, the committee would be very glad to hear you on the constitutionality of a bill so very broad in its scope as this—a bill that seems to undertake to regulate commerce within the States as well as interstate commerce.

Mr. JOHNSON. I have not thought of the constitutionality of the bill other than that Congress has power to pass a bill of this kind under the section of the Constitution which provides for patents.

The CHAIRMAN. Not at all. The Supreme Court has distinctly held that we have not any power at all under that clause.

Mr. BONYNGE. Over trade-marks.

Mr. JOHNSON. I was merely speaking to the principle of protection in any form or one form.

Mr. BONYNGE. You might work out something under the patent clause of the Constitution.

The CHAIRMAN. This bill, as now proposed in its amended form, is an amendment to the Bonynge trade-mark bill.

Mr. JOHNSON. I am not prepared to go into the constitutionality of the question. Anything that I might say here would be principally offhand, and it would not be worth consideration.

Mr. HINSHAW. Would it not be worth while to study up on that question and appear at another time?

Mr. JOHNSON. I can prepare a brief and submit it.

The CHAIRMAN. I think you should address yourself to that altogether.

Mr. BONYNGE. You can address yourself to the proposition that there is some authority for the law. First you must convince us that we have the power.

Mr. CHANEY. Let us hear from you again after you have given it deliberation.

Mr. KIRK. I would like to ask that same privilege.

The CHAIRMAN. Certainly; it will be granted.

Mr. CHANEY. The gentleman from Missouri [Mr. Clark] looks as though he had something to say this morning.

Representative CLARK, of Missouri. I have never read the bill and have not studied the subject of the constitutionality of it.

Mr. CHANEY. This is a question of the Constitution between freinds. [Laughter.]

Mr. HINSHAW. Did you come here in behalf of this bill?

Mr. CLARK. No; I came here to hear what was said about it. I know this in a general way that the nursery people in the country are in favor of it. I suppose I have as much nursery work in my Congressional district as any district in the United States. The Stark Brothers are in my district, and it is supposed to be the largest establishment in the world. By the way, it has a branch out near Denver. It was established in 1835, and I think in its ramifications, counting its outside plants in one State and another—it has two plants in New York State—it is the largest in America. But all of

them are in favor of it. There is one down in New Haven about half as big as Stark's. I never thought of the constitutional phase of it. I used to be on this committee for a long time. I wanted to hear both sides, as to what they wanted to say. If the bill is not exactly right in its terms at present, it might be recast.

Mr. BONYNGE. You know the Supreme Court has held that our whole power over trade-marks comes under the interstate clause in the Constitution. That is where we derive all our power over trade-marks. This bill seeks to include some of the features of the patent law. It may be that a bill could be drafted under the patent law, but I do not see how any could be drafted under the trade-mark law to accomplish what these gentlemen seek to accomplish.

Mr. CLARK. Of course if there is a constitutional question, that is the first question to be disposed of. If there is any way of taking away some of the power of the Interstate and Foreign Commerce Committee by this bill, I am in favor of it. It has now got too much. It runs the whole Congress. [Laughter.]

Mr. CHANEY. Mr. Chairman, I very much sympathize with the purposes of the bill, for I believe that the people who are improving agriculture and horticulture are a very valuable element of our civilization, and if it is possible for these men to figure out some bill by which we can be of service to them, I would certainly be in favor of it. I hope, therefore, these gentlemen will all give us some assistance in looking up the question, and I suggest that we ourselves give a little time to looking it up and see if we can not come to a common basis where we can be of use. I have some nurserymen out in my country who have written to me about this bill, and they have called upon me with great deliberation to support this bill.

The CHAIRMAN. I might say that you will find that the nurserymen are divided on this question. Protests have reached the committee from great nurserymen against the passage of the bill.

Mr. CHANEY. I have had one protest. The rest are all in favor of it. But, on the general proposition involved, it seems to me the suggestion is valuable, and I can not see but that there ought to be some means of protecting these people, because they have certainly been very valuable—the propagators as well as the other people mentioned in the remarks of the gentleman.

Mr. CLARK. There is no question in the world but that Luther Burbank has done as much for the comfort of the people and the world generally as any man now living. I make that assertion without any hesitation at all.

Mr. BONYNGE. We have not considered the constitutional question—that is, on the general features.

Mr. CHANEY. I have a constituent who has gotten up a design of a combination trade-mark, and he has included in his proposed trade-mark something like five other trade-marks for a brand of flour. He has, for instance, the word "Eclipse," I think it is, at the top of the sack of flour; a picture of an eclipse of the sun, or the face of the sun, and below that he has the word "Eclipse." Now, nobody ever had a picture of an eclipse, but the word "eclipse" has been used by another man. Down below is a picture of a dove holding in its beak a streamer, on which is written "White silk." Nobody has ever had a dove in the picture, but the words "White dove" and "White silk" are in other trade-marks which are cited.

Mr. BONYNGE. I do not think that ought to be registered.

Mr. CHANEY. And still below that are the words, "The Best."

Mr. BONYNGE. His object was to get the benefit of those other trade-marks, evidently.

Mr. CHANEY. No; by no means. He was not seeking to get the benefit of anything but his own business. But he had no idea that anybody else had those at all, and nobody had it as he has.

Mr. BONYNGE. I would turn him down right away.

Mr. CHANEY. What is the reason why a man can not have a trade-mark in combination with other trade-marks?

Mr. BONYNGE. It would lead to confusion, and it deceives the public. You would destroy the value of all trade-marks by that method.

Mr. GILL. Mr. Chairman, would you call that an omnibus trade-mark? [Laughter.]

Mr. CHANEY. I would call that a combination. Nobody has anything new in a patent-right line. It is all combination.

Mr. BONYNGE. Articles are sold under a name, and if a man knew that the other trade-marks were registered, the object of taking the other trade-marks would be to combine in his trade-mark the benefit that the others had got by advertising his particular article.

Mr. MCGAVIN. Suppose the parlor match had not the blue ribbon on there and somebody else came along and put it on?

Mr. KIRK. Mr. Crawford, who says he is acquainted with all the nurserymen in the United States, says that the only ones who are opposed to this bill are principally commercial men. They are not interested in propagation.

The CHAIRMAN. Green & Co., Elwanger & Barry, and the great nurserymen of Rochester are opposed to it. Mr. Payne spoke to me for Elwanger & Barry. I think Mr. Perkins has also spoken to me.

Mr. JOHNSON. The largest nursery or the wealthiest nursery in New York State is the Jackson-Perkins Company. That is the one from which Mr. Kirk read a letter a few minutes ago. The Starks are the largest nursery company in the world, having not only branch nurseries but subsidiary concerns throughout the whole United States and in some foreign countries, and in capitalization it is four times larger than any other company in the United States.

The CHAIRMAN. As a lawyer, you see the difficulties now that confront the committee in trying to act upon this bill.

Mr. JOHNSON. There is no question about that.

The CHAIRMAN. If you will look this matter up carefully and come before the committee on almost any Wednesday we will be very glad to hear from you.

Mr. JOHNSON. There will be no necessity to appoint a time?

The CHAIRMAN. Not at all. But we would prefer you would appoint a time, because sometimes we do not have a stenographer here, and we would like to have your statement as a part of the record.

Mr. JOHNSON. A week's notice that we would be ready would be sufficient, would it?

The CHAIRMAN. Yes; that would be ample.

Now, I desire to call the attention of the committee to a letter which I received from Mr. Arthur Steuart regarding the bill H. R. 13942, and Mr. Steuart incloses a letter from Mr. R. H. Parkinson, of Chicago. They desire that the latter shall be made a part of the record.

Mr. CHANEY. It relates to that bill?

The CHAIRMAN. Yes: to that criminal feature of the bill. It is in reply to the brief filed by Forbes and Haviland attacking the constitutionality of the bill. Here it is. Suppose I read it [reading]:

BALTIMORE, MD., *March 27, 1906.*

Hon. F. D. CURRIER,
House of Representatives, Washington, D. C.

MY DEAR MR. CURRIER: When I received a copy of Mr. Barber's brief I at once sent it to Mr. Robert H. Parkinson, of Chicago, who had given careful attention to the preparation of section 1 of H. R. 13942.

I have a letter from him replying to Mr. Barber, and I inclose Mr. Parkinson's letter herewith. I shall be glad to have this letter read to the committee and printed in your records.

If any of your members would like to go more deeply into this question, they will find a most scholarly argument upon the subject by Mr. Parkinson in the proceedings of the American Bar Association for 1903, which will repay an examination. I have asked Mr. Parkinson to notify me when he is coming East, and I should be glad to have the committee hear him upon this subject.

In studying the bill 13942 I find that it can be somewhat simplified by eliminating some of the clauses. I send you a corrected copy and would be indebted if you would have the bill reprinted in the corrected form, with added section.

Yours, truly, ARTHUR STEUART.

CHICAGO, *March 10, 1906.*

ARTHUR STEUART, Esq.,
Maryland Trust Building, Baltimore, Md.

DEAR MR. STEUART: I have yours of 6th instant. There is but one suggestion I have to make concerning House bill 13942. It is the same suggestion I made in the paper read at the meeting of the American Bar Association in 1903, viz, that importing into the State and exporting therefrom should be explicitly defined as including shipments from and to other States and Territories as well as to and from foreign countries, otherwise the term might be construed as relating only to importation from foreign countries. I should think a short section at the end of the bill would be an appropriate way to cover this.

I have today looked over the brief submitted under the name of Forbes & Haviland, to which you call my attention and which I had not seen. I find nothing in it to modify in the slightest degree my opinion that the power to regulate trade-marks as an instrument of interstate or foreign commerce includes the power to protect such trade-marks as are used in interstate or foreign commerce against any act which defeats or impairs the performance of their functions as instrumentalities of such commerce, irrespective of whether such interference be committed in one or more States. I understand the right to regulate and protect under this clause of the Constitution to be dependent upon the character of commerce in which the mark so regulated and protected is used, but I understand, further, that the right to protect such a mark as an instrument of interstate or foreign commerce involves the right to forbid every act which defeats the object of such protection, irrespective of whether that act takes the form of interstate commerce or be confined to one State.

The object of the regulation and protection of a mark used in interstate or foreign commerce is to make it effectual as an instrument of such commerce and safeguard it against whatever will impair the performance of its legitimate function in such commerce. The trade-mark affixed to articles of foreign or interstate commerce is the identification accompanying such articles from the manufacturer in one State to the purchaser in another State, by which the commercial transaction is guided and facilitated. It is an instrument participating in this commercial transaction, accompanyng the subject of commerce, and depended upon by the purchaser in one State as an assurance that he is obtaining the article made at the place and by the person with which such trade-mark has become associated. It is depended upon by the manufacturer to identify his goods in every State to which they go.

The performance of this function as such an identification and guaranty in the commerce carried on between the State where the article is made and impressed with this trade-mark and the State where it is sold is just as really

interfered with by a fraudulent imitation of such trade-mark made and put upon the market in either State to which such genuine goods are imported or from which they are exported as if the fraudulent imitator sent his fraudulent imitation across a State line. The jurisdiction of Congress to give protection depends upon the office performed by the protected trade-mark in interstate commerce, not upon whether the counterfeiter is engaged in interstate commerce. The right to protect the mark having attached to it as an instrument of interstate commerce, and it having thus come under the jurisdiction of Congress, it is not necessary to inquire whether the act by which this protection is defeated or destroyed is one over which Congress would have jurisdiction independent of its jurisdiction over the interstate commerce in which the genuine mark is used. I have presented this subject more fully in the article found in the Reports of the American Bar Association for 1903 (especially pp. 608–643), and see no object in repeating what I have there said.

The attack upon my article in the brief above referred to seems to lose sight entirely of the fact that the jurisdiction of Congress to protect interstate commerce is not limited to its protection against acts which themselves constitute interstate commerce. If it were so limited it would be altogether ineffectual, and most of the laws which have been passed under this clause of the Constitution, and the decisions of the Supreme Court supporting and enforcing these laws, would be abrogated. It also seems to proceed upon the assumption that no act which otherwise would be within the police power of the State can be prohibited or punished as interference with interstate commerce, an assumption also in direct conflict with the decisions touching this subject.

As more fully stated in my article above mentioned, the power of Congress to prohibit and punish acts that interfere with any instrumentality of interstate commerce concerning which it has legislated does not depend upon whether such acts as are prohibited and punished would themselves partake of the nature of interstate commerce. It is enough that they interfere with or tend to defeat the object of safeguards which Congress has provided for such commerce, or impair the efficacy of its regulations concerning such commerce. Nor does an act which interferes with any safeguard provided for such commerce escape Congressional control because it is of such a character that it might be punished under the police powers of the State. A very large proportion of the acts which have been treated as interference with interstate commerce are acts which, considered apart from this, would be punished as crimes against the State.

From the decisions of Chief Justice Marshall in McCulloch *v.* Maryland (4 Wheaton, 316) and Gibbons *v.* Ogden (9 Wheaton, 1), and Justice Story in United States *v.* Coombes (12 Peters, 72) down to the recent decision of the Supreme Court In re Debs (158 U. S., 564) the power to punish acts which in themselves would be violations of the police power of the State, which were committed only within one State, and which were not in themselves acts of interstate commerce, has been uniformly recognized, it being enough that they interfered with some regulation of Congress intended for the promotion or convenience or safeguarding of interstate commerce.

I am not asserting any right of Congress under this provision of the Constitution to go beyond regulating and protecting marks used in interstate or foreign commerce, but merely asserting that when it undertakes to regulate and protect the use of trade-marks as instruments of such commerce it can make this effectual by prohibiting whatever acts would render such regulations and protection ineffectual or defeat or impair the safeguard to such commerce which such marks are intended to afford. To counterfeit such marks and place them upon goods of similar character in any State where imported goods bearing the protected mark are sold is to nullify the protection extended to that mark as a safeguard to such interstate or foreign commerce. This effect is nullifying and defeating the object of Congressional legislation is precisely the same whether the counterfeit mark is applied to goods brought from another State or to goods made and marketed in the same State. Such counterfeiting is prohibited and punished because it destroys the protection afforded to the interstate commerce to which the genuine mark is attached, not because the counterfeiting is in itself an act of interstate commerce.

The brief above mentioned charges that my contention (more fully stated in my article in the Reports of the American Bar Association) is in error in assuming that the perfect protection and ultimate purpose of a trade-mark in commerce is involved in the power to regulate the use of these marks in interstate and foreign commerce, but it admits that "so long as an infringer is able

to make use of an infringing mark within a single State without making himself amenable to process of the Federal courts the protection afforded by the Federal statutes will remain in a degree imperfect." The fact is that the whole object of Congressional regulation of marks used in interstate or foreign commerce is effectually defeated if they can be counterfeited in every State of the Union with impunity, so far as any protection given by the statute is concerned. A trade-mark that can thus be counterfeited with impunity wherever it goes ceases to afford any protection to the commerce in which it is used. To make the trade-mark effectual as an instrument of interstate or foreign commerce with which it is identified it must be protected against any fraudulent imitation, and the object of such protection is to secure to it its legitimate function as a safeguard to such interstate and foreign commerce.

The proposed bill (13942) is so drawn as to plainly limit the protection afforded to marks used in interstate and foreign commerce or commerce with the Indian tribes, and every provision made therein is essential to any substantial protection to such marks as instruments of such commerce. No act is punished or prohibited except an act which interferes with and is prejudicial to the protection of such marks as instruments of such commerce.

We have undertaken by treaty to give protection to trade-marks of other countries when used in commerce with this country. Our treaty obligations are not limited to protection against acts that are committed in more than one State, but plainly include protection against whatever interferes with the exclusive right of the owner of the mark used in commerce with this country.

We are persistently false to our obligation if our statute affords no protection against infringement committed in any State of the Union, unless that infringer is also engaged in foreign or interstate commerce. Hence, if a statute giving protection could not be maintained under the commerce clause, there should be one under the treaty clause so framed as to give protection against infringement in this country of trade-marks belonging to citizens of the countries with which we have such treaties. But it comes to me entirely clear that the power under the interstate and foreign commerce clause is adequate to give complete protection to trade-marks used in such commerce, and that uniformity in the regulation of commerce between the States as well as commerce with foreign countries demands the exercise of this power by Congress.

Yours, very truly,

R. H. PARKINSON.

Mr. BONYNGE. He makes a pretty strong argument.

Mr. CHANEY. That is good philosophy, too.

Mr. BONYNGE. But the first question that must be determined is whether the trade-mark at all comes within our power. That is now before the courts, and consequently, even if I felt disposed to extend the protection further than we have in the bill, the Supreme Court——

Mr. CHANEY. I have observed this, that the Supreme Court of the United States grows with our institutions, and that its ideas as to the liberties permitted under the Constitution are, under the opinions of the Supreme Court of our day, much more extensive than they were under the opinions of the Supreme Court of days gone by; and I believe that there is such enterprising growth in these matters that we are beginning to see that the limits of our Constitution are far beyond what they used to be. I sincerely hope that the Supreme Court, when it gets to the question now before it for decision, will see its way clear to permit some of these things which we hardly thought were permitted under the Constitution formerly.

Mr. GILL. I think that Mr. Chaney is fast getting to that opinion held by some distinguished citizen of this country, "What is the Constitution between friends?" [Laughter.]

The CHAIRMAN. It occurred to me that perhaps he was adopting Mr. Dooley's theory, that "the decisions of the Soopreme Coort follow closely afther the eliction returns." [Laughter.]

Mr. CHANEY. The purpose is a good one, that which makes for the higher civilization, which comes from the men who think and act; and those are the people who are doing this in their branch of inquiry, and I hope we can get at it.

Mr. BONYNGE. I think we can well afford to wait until the court has passed upon it.

The CHAIRMAN. They have raised the question of the constitutionality of the Bonynge bill now; that is on its way to the Supreme Court.

Mr. BONYNGE. I think we have a pretty good bill, provided we can maintain it.

Mr. CHANEY. Yes; I think the bill which bears your name, and which went through this committee, marks an advance, and I am heartily in favor of it.

The CHAIRMAN. As chairman of the committee in the last Congress, I want to say that that bill is a great deal more the Bonynge bill than would be inferred simply from the fact that it bears the name of Mr. Bonynge. That bill was drawn, every word of it, by Mr. Bonynge, after the most painstaking investigation.

Mr. BONYNGE. Of course I had the benefit of the views and arguments presented to the committee.

The CHAIRMAN. Yes; but Mr. Bonynge is entitled to the credit in a large degree for that legislation.

Mr. CHANEY. I wanted Mr. Bonynge to give to the committee and the country the benefit and service of investigating this proposition.

[Thereupon, at 12 o'clock noon, the committee adjourned.]

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